

Navajo Education Technology Consortium	)	SLD No. 306050
Gallup, New Mexico)	
)	
Memphis City School District	)	SLD No. 331487
Memphis, Tennessee)	
)	
International Business Machines, Inc. on behalf of	)	SLD No. 331487
Memphis City School District)	
Memphis, Tennessee)	
)	
Albuquerque School District	)	SLD No. 320461
Albuquerque, New Mexico)	
)	
International Business Machines, Inc. on behalf of	)	SLD No. 320461
Albuquerque School District)	
Albuquerque, New Mexico)	
)	
Federal-State Joint Board on	)	CC Docket No. <u>96-45</u>
Universal Service)	
)	
Changes to the Board of Directors of the	)	CC Docket No. 97-21
National Exchange Carrier Association, Inc)	

ORDER

Adopted: December 4, 2003

Released: December 8, 2003

By the Commission:

I. INTRODUCTION AND OVERVIEW

1. Before the Commission is a Request for Review by the Ysleta Independent School District (Ysleta), El Paso, Texas, and similar Requests for Review filed by seven other schools set forth in the caption.¹ As noted in the caption, International Business Machines, Inc. (IBM) also files a Request for Review in most of the appeals.² The schools and IBM seek review of decisions of the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (Administrator), denying \$250,977,707.08 in schools and libraries universal service

¹ *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District*, CC Docket Nos 96-45 and 97-21, Request for Review, filed January 30, 2003 (Ysleta Request for Review). Relevant citations for the other appeals are contained in the Appendix.

² *See, e.g., Request for Review of the Decision of the Universal Service Administrator by International Business Machines, Inc. on behalf of Ysleta Independent School District*, CC Docket Nos 96-45 and 97-21, Request for Review, filed January 30, 2003 (IBM Request for Review).

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Request for Review of the)	
Decision of the)	
Universal Service Administrator by)	
)	
Ysleta Independent School District	)	SLD No. 321479
El Paso, Texas)	
)	
International Business Machines, Inc. on behalf of)	
Ysleta Independent School District	)	SLD No. 321479
El Paso, Texas)	
)	
Donna Independent School District	)	SLD Nos. 317242, 317016, 311465,
Donna, Texas	)	317452, 315364, 309005,
	)	317363
)	
International Business Machines, Inc. on behalf of	)	SLD Nos. 317242, 317016, 311465,
Donna Independent School District	)	317452, 315364, 309005,
Donna, Texas	)	317363
)	
Galena Park Independent School District	)	SLD Nos. 314879, 305340
Houston, Texas)	
)	
International Business Machines, Inc on behalf of	)	SLD Nos 314879, 305340
Galena Park Independent School District)	
Houston, Texas)	
)	
Oklahoma City School District I-89	)	SLD No. 315578
Oklahoma City, Oklahoma)	
)	
International Business Machines, Inc on behalf of	)	SLD No. 315578
Oklahoma City School District I-89)	
Oklahoma City, Oklahoma)	
)	
El Paso Independent School District	)	SLD Nos. 318522, 315768
El Paso, Texas)	
)	
International Business Machines, Inc on behalf of	)	SLD Nos. 318522, 315678
El Paso Independent School District)	
El Paso, Texas)	

support mechanism discounts to the schools for Funding Year 2002.³ Because each appeal raises very similar issues, we consolidate our review here.⁴ For the reasons set forth below, we affirm SLD's decisions and deny the Requests for Review. Under the terms set forth below, however, we waive the filing window for Funding Year 2002 to permit the above-captioned schools to resubmit requests for eligible products and services for Funding Year 2002 under the terms set forth below.⁵

2 The Commission is deeply concerned about a number of practices that undermine the framework of the competitive bidding process established by the Commission's *Universal Service Order* of May 8, 1997. If allowed to persist, the practices that we address in this Order could suppress fair and open competitive bidding, and ultimately thwart the goal of effective, efficient, and equitable distribution of universal service support to eligible schools and libraries. The Commission has directed program applicants to take full advantage of the competitive market to obtain cost-effective services and to minimize waste, fraud, and abuse. Reliance on competitive markets also assures that program funds can be distributed as widely and as equitably as possible among the applicants. To enhance competitive-market processes, the Commission has developed a process in which applicants first develop detailed technology plans that describe their technology needs and goals in a manner consistent with their educational or informational objectives. Having determined the services for which they would seek E-rate discounts,⁶ applicants would then submit for posting on the Administrator's website an FCC Form 470, listing the desired services, consistent with the technology plan, with sufficient specificity to enable potential bidders to submit bids for E-rate eligible services. Applicants could indicate on the FCC Form 470 if they also had a Request for Proposal (RFP) providing additional detail on the services sought. Once an applicant received bids with specific prices quoted for eligible services, it would select the most cost-effective services, with price as the primary factor. Where consistent with these practices, applicants would rely on state and local procurement processes. This is the foundation upon which the Commission's rules and orders are based.⁷

³ See Appendix A *See Request for Review*; Letter from Schools and Libraries Division, Universal Service Administrative Company, to Richard L. Duncan, Ysleta Independent School District, dated December 3, 2002 (Funding Commitment Decision Letter), Letter from Schools and Libraries Division, Universal Service Administrative Company, to Richard L. Duncan, Ysleta Independent School District, dated December 3, 2002 (Further Explanation). Section 54.719(c) of the Commission's rules provides that any person aggrieved by an action taken by a division of the Administrator may seek review from the Commission. 47 C.F.R. § 54.719(c).

⁴ For ease of discussion, our analysis in this Order will focus on the facts presented in the Ysleta appeal. We provide additional information about the eight other appeals in Appendix B.

⁵ There are additional appeals before SLD that are factually similar in nature to the appeals discussed herein. SLD shall address those appeals in accordance with the terms of this Order.

⁶ "E-rate" is the colloquial term by which the schools and libraries support mechanism is widely known.

⁷ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9076-80, paras. 570-80 (1997) (*Universal Service Order*), as corrected by *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Errata, FCC 97-157 (rel. June 4, 1997), *affirmed in part*, *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) (affirming *Universal Service First Report and Order* in part and reversing and remanding on unrelated grounds), *cert. denied*, *Celpage, Inc. v. FCC*, 120 S. Ct. 2212 (May 30, 2000),

3 The procurement processes presented in the instant Requests for Review thwart the Commission's competitive bidding policies. The factual scenarios of the different applicants vary to some degree, but all present troubling conduct or outcomes that are inconsistent with the competitive bidding procedures required by our rules and orders. Most of the above-captioned applicants selected a Systems Integrator to provide millions of dollars worth of services, but chose the Systems Integrator without seeking bids on any of the prices of the specific E-rate-funded services sought. Most of the applicants also submitted FCC Forms 470 expressing interest in purchasing a catalogue of virtually every eligible service, rather than developing a list of services actually desired, based on their technology plans, with sufficient specificity to enable bidders to submit realistic bids with prices for specified services. Some applicants also stated on their FCC Forms 470 that they did not have an RFP relating to the E-rate eligible services, and then subsequently released such an RFP just a few days later.

4. These practices are contrary to our rules and policies and create conditions for considerable waste of funds intended to promote access to telecommunications and information services. Such waste harms individual applicants that do not receive the most cost-effective services. If allowed to continue, the practices identified here would harm other applicants who may be under-funded because funds needlessly have been diverted to these excessive program expenditures. Further, it would damage the integrity of the program, which to date has successfully provided discounts enabling millions of school children and library patrons, including those in many of the nation's poorest and most isolated communities, to obtain access to modern telecommunications and information services for educational purposes, consistent with the statute.

III. BACKGROUND

A. Communications Act and Commission Rules

5. Under the schools and libraries universal service support mechanism, eligible schools, libraries, and consortia that include eligible schools and libraries, may apply for discounts for eligible telecommunications services, Internet access, and internal connections.⁸ Section 254(h)(1)(B) of the Act provides, "All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to [schools and libraries] for educational purposes at rates less than the amounts charged for similar services to other parties . . ."⁹ The Commission elaborated on the meaning of "bona fide" in the *Universal Service Order*, where it stated that Congress "intended to require accountability on the part of schools and libraries," which should therefore be required to "(1) conduct internal assessments of the components necessary to use effectively the discounted services they order; (2) submit a

cert denied, AT&T Corp v Cincinnati Bell Tel Co, 120 S Ct 2237 (June 5, 2000), *cert dismissed, GTE Service Corp v FCC*, 121 S Ct 423 (November 2, 2000)

⁸ 47 C F R §§ 54.502, 54.503

⁹ 47 U S C § 254(h)(1)(B) (emphasis added)

complete description of services they seek so that it may be posted for competing providers to evaluate; and (3) certify to certain criteria under perjury.”¹⁰

6 In the *Universal Service Order*, the Commission designed the program application structure to encourage competitive bidding on specific eligible products and services. Our rules provide explicit requirements for applicants to develop technology plans based on the reasonable needs and resources of the applicant, setting forth in detail how the applicant will use certain technologies in the near term and into the future, and how they plan to integrate the use of the technologies into their curriculum.¹¹ At the time of the FCC Form 470 filing, applicants must certify whether their technology plans have been approved, and that they recognize that support is conditional upon securing access “to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to use the services purchased effectively.”¹² This requirement limits waste in the program by ensuring that products and services for which discounts are sought have been carefully selected to complement an applicant’s educational and information goals, consistent with available resources. The Commission specifically required that technology plans be independently approved, to ensure that the plans are based on the “reasonable needs . . . of the applicants and are consistent with the goals of the program”¹³

7 The Commission’s rules state that “an eligible school or library shall seek competitive bids . . . for all services eligible for support . . .”¹⁴ Under our rules, the competitive bidding process involves the use of an FCC Form 470 describing services being sought. An eligible school, library, or consortium seeking to receive discounts for eligible services must submit to the Administrator a complete FCC Form 470, which must include certain information such as information about the computer equipment, software, and internal connections available or budgeted for purchase, and staff experience.¹⁵ As explained in the *Universal Service Order*, the Form 470 must “describe the services that the schools and libraries seek to purchase in sufficient detail to enable potential providers to formulate bids. . . .”¹⁶ Each

¹⁰ *Universal Service Order*, 12 FCC Rcd at 9076, para 570

¹¹ See *Universal Service Order*, at 9077, para 572-74.

¹² *Id.* In a recent Further Notice of Proposed Rulemaking, the Commission sought comment on whether to change our rules so that applicants may certify that their technology plans will be approved by the time that E-rate supported services begin. See *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Second Report and Order and Further Notice of Rulemaking, FCC 03-101 at paras 99-100 (rel. April 30, 2003) (*Second Order and FNPRM*)

¹³ *Universal Service Order*, 12 FCC Rcd at 9077, paras 573-74

¹⁴ 47 C.F.R. § 54.504(a)

¹⁵ 47 C.F.R. § 54.504(b)

¹⁶ *Universal Service Order*, 12 FCC Rcd at 9078, para 575 (emphasis added)

applicant must certify in its FCC Form 470 that it has developed a technology plan that has been approved by an authorized entity.¹⁷

8 The Administrator must post each applicant's Form 470 on SLD's website, allowing review by all potential competing service providers.¹⁸ After waiting at least four weeks so that competing providers may consider submitting competitive bids for services, the eligible school, library, or consortium seeking discounts may then enter into a contract with the chosen service provider. The applicant then submits a completed FCC Form 471 application to the Administrator, indicating the selected service provider and services for which discounts are sought.¹⁹ SLD reviews the FCC Forms 471 that it receives and issues funding commitment decisions in accordance with the Commission's rules. Applications that are received outside of this filing window are subject to separate funding priorities under the Commission's rules, and typically do not receive funding.²⁰

9. Under our rules, applicants must select the most cost-effective bids.²¹ The Commission's rules state, "These competitive bid requirements apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements."²²

B. Ysleta

10 Ysleta initially developed a technology plan in 1993, then revised it in 1998, partly to comply with the Commission's newly adopted rules governing the new schools and libraries support mechanism.²³ Ysleta modified its technology plan again in May 2001.²⁴ Ysleta's

¹⁷ 47 U.S.C. § 54 504(b)(2)(vii). An applicant must certify that its technology plan has been "certified by its state, the Administrator, or an independent entity approved by the Commission." *Id.* Technology plans must establish the connections between the information technology and the professional development strategies, curriculum initiatives, and objectives that will lead to improved education or library services. They must (1) establish clear goals and a realistic strategy for using telecommunications and information technology to improve education or library services, (2) include a professional development strategy to ensure adequate use of the technology, (3) include an assessment of the telecommunications services, hardware, software, or other services needed; (4) provide for a sufficient budget, and (5) include an evaluation process to monitor progress and make mid-course corrections. See *Universal Service Order*, 12 FCC Rcd at 9077-78, paras. 572-74; SLD web site, *Frequently Asked Questions About Technology Planning*, <<http://www.sl.universalservice.org/reference/TechnologyPlanningFAQ.asp>>

¹⁸ 47 C.F.R. § 54 504(b), *Universal Service Order*, 12 FCC Rcd at 9078, para. 575.

¹⁹ 47 C.F.R. § 54 504(b), (c), *Schools and Libraries Universal Service, Services Ordered and Certification Form*, OMB 3060-0806 (FCC Form 471). The FCC Form 471 notifies SLD of the services that have been ordered and indicates the amount of discounts sought. *Id.*

²⁰ 47 C.F.R. § 54 507(g).

²¹ *Universal Service Order*, 12 FCC Rcd at 9029-30, para. 481.

²² 47 C.F.R. § 54 504(a).

²³ See Ysleta Appendix I, Tab 3, Ysleta Long-Range Technology Plan, History, Overview at 1. Consistent with our rules, Ysleta's technology plan was approved by the State of Texas. See Ysleta Request for Review at 8; FCC Form 470, Ysleta Independent School District, posted October 12, 2001 (Ysleta Form 470).

Trustees selected IBM “as the putative awardee . . . if a final contract (including pricing) was successfully negotiated and finalized”⁴²

15 Only after Ysleta chose IBM as the putative awardee did Ysleta begin negotiating the scope of work and cost of the actual products and services for Funding Year 2002 that would be eligible for discounts under the support mechanism.⁴³ The contract that IBM and Ysleta ultimately entered into set forth five Statements of Work, each with detailed specifications, prices, and terms. Cabling Services (\$2,090,400),⁴⁴ Network Electronics (\$965,500),⁴⁵ Network File and Web Servers (\$3,945,320),⁴⁶ Basic Unbundled Internet Access (\$968,600),⁴⁷ and Technical Support Services (\$12,409,811).⁴⁸ This last Statement of Work covered: “IBM Project Management of the Technical Support Office; network infrastructure support, Local Area Network technical support, including network hardware; technical support procedures supporting networking systems and maintenance, including design, installation, implementation, and customization of network functions; and dedicated technical resources for network technical support on a time and materials basis.”⁴⁹

16 As negotiated, the contract provided for a one-year term, and could be terminated by Ysleta upon thirty days notice.⁵⁰ The contract also entitled Ysleta to review IBM’s pricing of products, and to direct IBM to contract with particular vendors for specific products specified in a Statement of Work, provided that IBM approved the selection based on its standards for vendor quality.⁵¹ Ysleta contends that in negotiations with IBM prior to signing the contract, it refused a request from IBM to add another project, and that it negotiated substantial changes in pricing with IBM, totaling “many millions of dollars.”⁵²

17. On January 17, 2002, the final day of the filing window for Funding Year 2002 applications for discounts, Ysleta completed negotiations with IBM, signed the contract, and

⁴² *Id*

⁴³ See IBM Request for Review at 7

⁴⁴ See Ysleta Appendix II, Tab 7 (General Contract), IBM Statement of Work for Cabling Services at 13

⁴⁵ See General Contract, IBM Statement of Work for Network Electronics at 13

⁴⁶ See General Contract, IBM Statement of Work for Network File and Web Servers at 20

⁴⁷ See General Contract, IBM Statement of Work for Basic Unbundled Internet Access at 11.

⁴⁸ See General Contract IBM Statement of Work for Technical Support Services at 22

⁴⁹ *Id* at 7

⁵⁰ *Id* at 11, See General Contract at 1 01, 10 01

⁵¹ See General Contract at 10 01

⁵² Ysleta Request for Review at 10

bidder's single SPIN number (Service Provider Identification Number)."³² The successful bidder would be identified based on points awarded for availability and quality of resources, staff development and training, project management/systems integration, technology solutions, commitment to K-12 education, District funding considerations, pricing model and cost assurances, and other vendor attributes.³³

12 The RFP did not seek pricing information from bidders concerning products and services for which discounts under the support mechanism would be sought, nor did it require the successful bidder to provide such information as part of its bid.³⁴ Prospective bidders were required to provide a proposed pricing model that would demonstrate throughout the life of the contract that costs would be within normal and customary charges, would be simple to administer, meet all statutory requirements for recordkeeping and auditing, adhere to district purchasing policy, and be flexible within established budgets.³⁵

13 The deadline for responses to the RFP was November 15, 2001.³⁶ Five vendors submitted bids: IBM, Avnet Enterprise Solutions, Compaq Computer Corp., I-Next, Inc., and SBC-Southwestern Bell.³⁷ IBM submitted a 147-page response that addressed each category in the RFP, describing in general terms IBM's experience and resources.³⁸ Under the "Pricing Model and Cost Assurances" category, IBM stated that "the only inputs necessary to determine a price are: length of project, number and type of project resources required, and determination of IBM's risk assumption."³⁹ The only actual prices quoted by IBM were part of a schedule of hourly rates strictly for Systems Integration, ranging from \$394 per hour for a Project Executive to \$49 per hour for a Project Administrator.⁴⁰

14. Ysleta Technology Department and Purchasing Department officials reviewed the bids and recommended that IBM be selected.⁴¹ On December 12, 2001, the Ysleta Board of

³² RFP at 3 6. The SPIN is a number issued by SLD to identify service providers for purposes of the program.

³³ *Id.* at 3 7.

³⁴ See generally RFP.

³⁵ *Id.*

³⁶ Ysleta Request for Review at 9.

³⁷ *Id.*

³⁸ See IBM Response to Ysleta Request for Proposal, Ysleta Request for Review at Appendix II Tab 6 (IBM Bid).

³⁹ *Id.* at 77.

⁴⁰ *Id.* at 79-80.

⁴¹ See Ysleta Request for Review at 9.

Ysleta relationship was to maximize SLD funding, rather than promoting educational goals that were clearly defined in a technology plan.⁶¹ SLD also stated that after reviewing numerous RFPs issued by applicants that had relationships with IBM, it had found strikingly similar, and sometimes identical, language in the RFPs, indicating that IBM may have unduly influenced the selection process in IBM's favor.⁶² On January 30, 2003, Ysleta and IBM filed their Requests for Review with the Commission.⁶³

19 Under our rules, the Commission considers requests for review of decisions by the Administrator that involve novel questions of fact, law, or policy.⁶⁴ We conclude that the instant appeals meet this standard, and we engage below in *de novo* review of SLD's denials, as provided in our rules.⁶⁵

III. DISCUSSION

20 We have reviewed the records in the above-captioned Requests for Review. Upon careful review, and for the reasons discussed below, we conclude that Ysleta and the similarly situated applicants set forth in the caption violated our rules regarding competitive bidding, our requirements governing the weighting of price in selecting bidders, and the requirement that applicants submit bona fide requests for services.⁶⁶ In light of the circumstances presented, however, we conclude that waiving our filing deadlines in order to permit Ysleta and similarly situated applicants that have appealed SLD's denial of funding to re-bid for services for Funding Year 2002 is in the public interest.⁶⁷

21. Competitive Bidding Violations. Ysleta and IBM argue that Ysleta did not violate any Commission competitive bidding rules.⁶⁸ They argue that Ysleta did competitively bid for services, by filing an FCC Form 470 in accordance with program rules that listed eligible services sought, and which indicated that Ysleta was seeking a partnership with a Systems Integrator.⁶⁹ They also note that Ysleta thereafter published an RFP seeking the services of a

⁶¹ *Id.* at 9-10.

⁶² *Id.* at 10

⁶³ See Ysleta Request for Review, IBM Request for Review. As set forth in the Appendix, the eight other schools also timely filed Requests for Review. All of the Requests for Review involve schools that applied as eligible for 90 percent discounts under our discount matrix.

⁶⁴ See 47 C.F.R. § 54.723

⁶⁵ *Id.*

⁶⁶ The factual situations of the similarly situated applicants are set out in the Appendix. See Appendix B, *infra*.

⁶⁷ See section IV, *infra*. To the extent an applicant proceeded to take service, particularly telecommunications services or Internet access, notwithstanding SLD's denial of discounts, we do not and will not provide funding to pay for such services. See para. 75, *infra*.

⁶⁸ See Ysleta Request for Review at 13-32, IBM Request for Review at 11-32

⁶⁹ See Ysleta Request for Review at 13-17, IBM Request for Review at 11.

also filed its FCC Form 471 application.⁵³ Subsequently, on or about May 13, 2002, Ysleta received an Item 25 Selective Review Information Request from SLD, to which it responded with various information on June 3, 2002.⁵⁴ Ysleta and SLD thereafter exchanged further correspondence.⁵⁵ On December 3, 2002, SLD issued a decision denying Ysleta discounts, and also issued a Further Explanation providing greater detail for the reasons of the denial.⁵⁶

18 In the Further Explanation, SLD enumerated a number of reasons for denying the pending requests. SLD concluded that Ysleta violated our rules by failing to note on its FCC Form 470 that it had issued an RFP.⁵⁷ SLD also noted that the Form 470 process was circumvented because Ysleta's RFP did not require bidders to submit proposals for specific services with a definite price, but required only general information regarding the bidders' approach, qualifications, and experience as a Systems Integrator.⁵⁸ SLD determined that Ysleta violated the Commission's rules by selecting IBM without establishing that it was the most cost-effective provider of the services for which Ysleta was seeking discounts. SLD observed that even if Ysleta complied with state and local procurement rules, Ysleta failed to comply with the Commission's competitive bidding rules, with which applicants must comply in addition to state and local rules.⁵⁹ SLD concluded that IBM's proposal and the resulting contract included "a vast array of ineligible services" such as teacher and administrative personnel training, project management services, consulting services, and assistance in filling out program forms.⁶⁰ SLD stated that the record reflected that the overall goal of the IBM-

⁵³ See SLD web site, <<http://www.sl.universalservice.org/whatsnew/2002/012002.asp#011002b>>; FCC Form 471, Ysleta Independent School District, filed January 17, 2002 (Ysleta Form 471).

⁵⁴ See Ysleta Request for Review at 12. Item 25 of the FCC Form 471 requires applicants to certify that they had secured access "to all of the resources, including computers, training, software, maintenance, and electrical connections necessary to make effective use of the services purchased as well as to pay the discounted charges for eligible services." See FCC Form 471 at Item 25. SLD may review the accuracy of applicants' certifications regarding necessary resources, in order to ensure compliance with statutory requirements and Commission rules. See *Request for Review of the Decision of the Universal Service Administrator by United Talmudical Academy, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 97-21, Order, 15 FCC Rcd 423 (2000) (*United Talmudical Academy Order*). These certifications and other requirements are critical to curbing waste, fraud, and abuse in the schools and libraries universal service mechanism.

⁵⁵ See Ysleta Request for Review at 12.

⁵⁶ See Letter from Schools and Libraries Division, Universal Service Administrative Company, to Richard L. Duncan, Ysleta Independent School District, dated December 3, 2002 (Further Explanation). The same letter was sent to IBM. See Letter from Schools and Libraries Division, Universal Service Administrative Company, to John Policastro, IBM Corporation, dated December 3, 2002. As set forth in the Appendix, SLD issued decisions relating to the other schools on March 10 and March 24, 2003.

⁵⁷ *Id.* at 4.

⁵⁸ *Id.* at 4-5.

⁵⁹ *Id.* at 6-7.

⁶⁰ *Id.* at 8.

\$2,090,400 in Cabling Services, \$965,500 in Network Electronics, \$3,945,320 in Network File and Web Servers, \$968,600 in Basic Unbundled Internet Access, or \$12,409,811 it requested in Technical Support Services. Instead, the only dollar figures that Ysleta compared in its determination of cost effectiveness were the hourly rates of IBM employees (e.g., \$394 per hour for a Project Executive, with no estimate of the number of hours projected to complete specific projects) versus the hourly rates of competitors' employees.⁷⁷ These hourly rates are so unrepresentative of and unrelated to the large amounts of E-rate funding requested by Ysleta as to render the application of competitive bidding under the program virtually meaningless.⁷⁸

24 The Commission's rules and orders require competitive bidding on the actual products and services supported by the program, rather than merely on the basis of a vendor's hourly rates, reputation and experience. The Commission's orders state that "an eligible school [or] library . . . shall seek competitive bids . . . for all services eligible for support . . ."⁷⁹ Ysleta did not seek competitive bids for such services. Furthermore, in the *Universal Service Order*, the Commission directed that applicants must "submit a *complete* description of services they seek so that it may be posted for competing providers to evaluate."⁸⁰ Our rules therefore contemplate that applicants will compare different providers' prices for actual services eligible for support. Only by doing so can applicants ensure that, in accordance with our rules, they are receiving the most cost-effective services. As the Commission stated in its 1999 *Tennessee Order*, "We certainly expect that schools will evaluate the actual dollar cost proposed by a bidder . . ."⁸¹ The context of that statement makes clear that the Commission expected schools to evaluate the actual dollar amount of eligible services during the bidding process.⁸² From the evidence before us, we find that Ysleta did not comply with this requirement.

25. Because Ysleta failed to seek competitive bids for specific eligible services, it violated section 54.504(a) of our rules. Moreover, we cannot find Ysleta satisfied this requirement through the posting of its FCC Form 470. Although the posting of a FCC Form 470 will generally satisfy section 54.504(a), Ysleta's does not here because Ysleta made clear through its RFP, which was released almost simultaneously with its FCC Form 470, that Ysleta was actually seeking bids for a vendor to serve as the Systems Integrator in a two-step

⁷⁷ See IBM Bid at 79-80.

⁷⁸ Our review of the record of the other appellants reveals an identical approach. See Appendix B, *infra*.

⁷⁹ 47 C.F.R. § 54.504(a) (emphasis added).

⁸⁰ *Universal Service Order*, 12 FCC Rcd at 9076, para. 570 (emphasis added).

⁸¹ *Request for Review by the Department of Education of the State of Tennessee of the Decision of the Universal Service Administrator, Request for Review by Integrated Systems and Internet Solutions, Inc., of the Decision of the Universal Service Administrator, Request for Review by Education Networks of America of the Decision of the Universal Service Administrator, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45 and 97-21, Order, 14 FCC Rcd 13734, 13740, para. 13 (1999) (*Tennessee Order*).

⁸² *Id.*, 14 FCC Rcd at 13740, para. 13.

Systems Integrator, and received five competing bids for those services.⁷⁰ We are not persuaded by these arguments, however, because the competitive bidding in which Ysleta engaged was carried out without regard to the products and services eligible for discounts, such that the prices of actual services were never compared.

22 We conclude that the type of procurement practiced by each school in these cases violates our competitive bidding rules, because it effectively eliminates competitive bidding for the products and services eligible for discounts under the support mechanism. Section 54.504(a) of the Commission's rules specifically states that "an eligible school or library shall seek competitive bids . . . for all services eligible for support . . ."⁷¹ As the Commission has previously observed.

Competitive bidding is the most efficient means for ensuring that eligible schools and libraries are informed about all of the choices available to them. Absent competitive bidding, prices charged to schools and libraries may be needlessly high, with the result that fewer eligible schools and libraries would be able to participate in the program or the demand on universal service support mechanisms would be needlessly great.⁷²

Competitive bidding for services eligible for discount is a cornerstone of the E-rate program, vital to limiting waste, ensuring program integrity, and assisting schools and libraries in receiving the best value for their limited funds.⁷³

23 Ysleta engaged in a two-step procurement process, but only the first step, at which it selected the service provider, involved competitive bidding, and only in a limited fashion.⁷⁴ First, Ysleta sought competitive bids for a Systems Integrator without regard to costs for specific projects funded by the schools and libraries support mechanism.⁷⁵ Second, Ysleta negotiated with the Systems Integrator it had selected regarding the scope and prices of E-rate eligible products and services, but it never sought competing bids for those products and services, as required by our rules.⁷⁶ Thus, Ysleta never received a single competing bid for the

⁷⁰ See Ysleta Request for Review at 9, IBM Request for Review at 16

⁷¹ 47 C F R § 54.504(a)

⁷² *Universal Service Order*, 12 FCC Rcd at 9029, para. 480

⁷³ *Id.*, see also *Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, and 95-72, Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, ____ para. 185 (1997) (*Fourth Order on Reconsideration*) ("The competitive bidding process is a key component of the Commission's effort to ensure that universal service funds support services that satisfy the precise needs of an institution, and that the services are provided at the lowest possible rates.")

⁷⁴ Ysleta Request for Review at 27, IBM Request for Review at 5

⁷⁵ See generally RFP

⁷⁶ 47 C F R § 54.504(a)

to understand the specific technologies that the applicant is seeking.⁸⁷ Thus, a Form 470 that sets out virtually all elements that are on the eligible services list would not allow a bidder to determine what specific services the applicant was seeking. The Form 470 should not serve as a planning device for applicants trying to determine what is available or what possible solutions might meet the applicant's specified curriculum goals. A Form 470 should not be a general, open-ended solicitation for all services available on the eligible services list, with the hope that bidders will present more concrete proposals. The research and planning for technology needs should take place when the applicant drafts its technology plan, with the applicant taking the initiative and responsibility for determining its needs.⁸⁸ The applicant should not post a broad Form 470 and expect bidders to do the "planning" for its technological needs.

29 Some applicants have simple, straightforward requests, such as discounts on telephone lines to each of their classrooms or dial-up Internet access for several computers in a library. Other applicants seek discounts on highly complex and substantial systems that span multiple sites and utilize highly advanced equipment and services. The FCC Forms 470 developed from an applicant's technology plans should mirror the level of complexity of the services and products for which discounts are being sought.

30 The Commission has recognized that the applicant is the best entity to determine what technologies are most suited to meet the applicant's specific educational goals. The applicant's specific goals and technology plans are therefore unique to the applicant.⁸⁹ While we recognize that some states may, for valid reasons, want all applicants to have some level of uniformity in technological development, in cases where the Administrator finds "carbon copy" technology plans and Forms 470 across a series of applications, especially where the services and products requested are complex or substantial, and when the same service provider is involved, it is appropriate for the administrator to subject such applications to more searching

⁸⁷ *Universal Service Order*, 12 FCC Rcd at 9077-80, paras 572-579 (describing sequence of designing detailed technology plan and subsequently submitting detailed description of services sought); 47 C.F.R. § 54.504.

⁸⁸ For instance, in this case, Ysleta indicated on its FCC Form 470 that it sought the following types of high-bandwidth services for 63 sites: 56K, ISDN, DSL, Frame Relay, Fractional T1, DS1, DS3, OC3, ATM, Satellite, MAN, WAN, and LAN Interconnect. It is beyond dispute that 56K service is not functionally equivalent to a DS1. A properly-designed FCC Form 470 would identify the specific services sought, based on a realistic assessment of the most cost-effective way to meet the bandwidth needs of the specific schools to be served. For instance, in advance of posting its FCC Form 470, Ysleta should have been able to determine for each of the 63 sites the anticipated number of channels desired, based on the numbers of computers and students in each location, and thus should have specified how many sites were seeking DSL service versus a DS1 or a DS3 or whatever. We recognize that depending on the demographics within a school district, a district may choose to deploy a higher capacity pipe in, for instance, a high school serving 2000 students than an elementary school serving 300 students. But we do expect the applicant to determine in advance of posting its FCC Form 470 what tier or tiers of capacity it is seeking.

⁸⁹ Some might argue that applicants have similar goals and therefore it is not unreasonable for applicants to have similar or identical technology plans and Forms 470. At a high level, it is true that all schools have the same educational goal – to educate their students. For purposes of receiving discounts under the E-rate, however, we would expect some variation in how schools choose to meet their technology needs.

procurement process and was not seeking bids for all of the services outlined on its FCC Form 470.⁸³

26 Although we do not hold that the FCC Form 470 presented here violated our competitive bidding rules, in light of the actions of Ysleta and the other similarly situated applicants, we reiterate the importance of the FCC Form 470 to the competitive bidding process. The applicant's FCC Form 470, based on the applicant's technology plan, puts potential bidders on notice of the applicant's specific needs to encourage competitive bids, so that the applicant may avail itself of the growing competitive marketplaces for telecommunications and information services.⁸⁴ The fact that these certifications on the FCC Form 470, all of which relate to the actual products and services for which the applicant will seek discounts, are required on the FCC Form 470, indicates that the Commission's rules and procedures contemplate that providers will bid on the cost of the specific products and services eligible for discounts, based on the applicant's technology plan.⁸⁵ Our rules and procedures do not contemplate that potential providers will bid solely on Systems Integration services, with the expectation that the applicant will decide on specific products and services *after* the applicant has selected a provider.

27. We are troubled that Ysleta submitted an FCC Form 470 listing virtually every possible product and service for which it could conceivably seek discounts. Rather than representing the outgrowth of a carefully designed technology plan as required under our rules, offering potential bidders specific information on which to submit bids, Ysleta's FCC Form 470 failed to "describe the services that the schools and libraries seek to purchase *in sufficient detail to enable potential providers to formulate bids*." . . .⁸⁶

28 An applicant's FCC Form 470 must be based upon its carefully thought-out technology plan and must detail specific services sought in a manner that would allow bidders

⁸³ The record reflects that Ysleta developed a "tentative projects list" which served as the basis for negotiations regarding the eligible products and services Ysleta actually intended to seek. See Letter from Richard Duncan, Ysleta Independent School District, to Schools and Libraries Division, Universal Service Administrative Company, dated June 21, 2002 ("After IBM's response to the RFP/FCC Form 470 posting was determined to be the most responsive, and recommended for contract award, the tentative projects list was shared with IBM, it was then asked to assist in the definition of each item's (each IBM [Funding Request Number]) scope of work. This activity resulted in a shortened list comprised of individual FRNs, ultimately submitted for possible funding"). The fact that Ysleta discussed with IBM a specific tentative projects list that differed significantly from the overbroad list it submitted on its FCC Form 470 reinforces our view that Ysleta's FCC Form 470 was a paper exercise, and the RFP process effectively supplanted the FCC Form 470 posting.

⁸⁴ See *Universal Service Order*, 12 FCC Rcd at 9078 para. 575 (requirements to provide sufficient detail in the FCC Form 470), and at 9077 paras. 572-74 (technology plan requirements).

⁸⁵ See *supra* note 26. Ysleta states that no bids were received in response to its FCC Form 470, and that all bids received were for Systems Integration services in response to its RFP. See *Ysleta Request for Review* at 17. Given that Ysleta released its formal RFP only days after the posting of the FCC Form 470, it is not surprising that providers responded to the RFP but not the FCC Form 470. Not every FCC Form 470 will result in bids, but the requirement that applicants seek bids through the FCC Form 470 ensures that providers are notified of bidding opportunities.

⁸⁶ *Universal Service Order*, 12 FCC Rcd at 9078, para. 575 (emphasis added).

RFP for Systems Integration, fails to provide the specificity necessary to place potential bidders on notice of the services actually sought by Ysleta.⁹⁵

34 IBM argues that Ysleta's FCC Form 470 contained sufficient information for potential service providers to identify potential customers.⁹⁶ But in this instance, Ysleta's FCC Form 470 is simply too broad to provide useful guidance to any potential service provider. The fact that there may have been "nothing in the Form 470 that discouraged or prevented any potential services provider from using the contact information in the Form 470 to contact Ysleta regarding the subset of E-rate services Ysleta sought to procure" is irrelevant.⁹⁷ Applicants must submit a "complete" description of services sought "for competing providers to evaluate."⁹⁸ Service providers thus must have sufficient information to evaluate the services sought in order to formulate bids. Similarly, if an applicant on its FCC Form 470 refers potential bidders to an RFP it has released or will release, the applicant's RFP must provide sufficiently detailed and specific information that potential bidders may evaluate the E-rate eligible services sought in order to formulate bids.

35 We recognize that some past practices arguably could be construed as permitting broad FCC Forms 470.⁹⁹ Although we acknowledge that SLD has approved other funding requests in the past that utilized all-inclusive FCC Forms 470 similar to that submitted by Ysleta,¹⁰⁰ we are concerned about the use of such broad listings of services. We also recognize that SLD cautioned applicants in the past to be expansive in listing services on an FCC Form 470, to provide applicants with greater flexibility to make service substitutions post-commitment. But our consideration of the facts of this case lead us to conclude such practices should not be permitted on a going-forward basis.

36. We therefore clarify prospectively that the requirement for a *bona fide* request means that applicants must submit a list of specified services for which they anticipate they are likely

⁹⁵ See Ysleta Request for Review at 19

⁹⁶ See IBM Request for Review at 14

⁹⁷ *Id.* at 15

⁹⁸ *Universal Service Order*, 12 FCC Rcd at 9076, para. 570

⁹⁹ In a footnote in the Commission's *Brooklyn Order*, for example, the Commission stated that an applicant "is required to provide only general information about the services for which it seeks discounts, e.g., the number of phones that require service, number of dial-up connections necessary, as well as an assessment of the applicant's existing technology that may be necessary for the effective use of eligible services. See *Request for Review by Brooklyn Public Library, Federal-State Joint Board on Universal Service, Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, File No. SLD-149423, CC Docket Nos. 96-45 and 97-21, Order, 15 FCC Rcd 17931, 18598 n.4 (2000) (*Brooklyn Order*). However, that statement should not be read as authorizing applicants to prepare FCC Forms 470 that list every eligible service under the E-rate program.

¹⁰⁰ A number of appellants point to other FCC Forms 470 with similarities to those in appellants' cases, which were approved by SLD. See, e.g., *El Paso Request for Review* at 20-21, *IBM (Albuquerque) Request for Review* at 3-4, *Winston-Salem Request for Review* at 9-11. These applications, however, differ from the applications at issue here in that they did not contain the elements underlying our finding of competitive bidding violations, such as a two-step procurement process, or a failure to consider price as a primary factor in the vendor selection.

scrutiny to ensure there has been no improper service provider involvement in the competitive bidding process⁹⁰

31. On appeal, IBM raises several arguments concerning the Administrator's findings about the Ysleta FCC Form 470. As we have explained above, our decision here does not rely on Ysleta's FCC Form 470. Instead we are clarifying on a going forward basis how an applicant's FCC Form 470 must be based upon its technology plan and must detail specific services sought in a manner that allows bidders to understand the specific technologies that the applicant is seeking. Thus, for purposes of this appeal, IBM's arguments concerning the Form 470 are inapposite. In the interest of clarity, however, we respond to its arguments so that applicants will understand more completely the Commission's requirements as they relate to the FCC Form 470.

32. IBM argues that the fact that five providers bid on Systems Integration services demonstrates that there was sufficient information to enable service providers to prepare bids for the provision of products and services eligible for discounts.⁹¹ Just as an FCC Form 470 may fail to provide sufficient information to potential bidders by not listing all the services for which the applicant may seek discounts, an applicant's FCC Form 470 may fail to provide sufficient information by virtue of its overbreadth, with so many services listed that it fails to indicate which services the applicant is likely to pursue.⁹² Potential vendors of specific services are less likely to respond to an all-inclusive FCC Form 470, concluding that the applicant does not realistically intend to order all services listed, and being unable to determine which services are actually being sought.

33. Similarly, IBM argues that interested providers may contact an applicant with a comprehensive FCC Form 470 to obtain additional information that would explain what the applicant seeks.⁹³ But the purpose of the FCC Form 470 is not to allow an applicant to indicate its interest in E-rate services generally, with the burden being on potential bidders to find out whether the services they offer might be among those sought by an applicant. Otherwise, the FCC Form 470 would merely need to include a single box that an applicant could check if it anticipated receiving E-rate services, and there would be no need to list or describe those services. Rather, the FCC Form 470 is intended "to allow providers to reasonably evaluate the requests and submit bids."⁹⁴ Ysleta's FCC Form 470, even if considered in conjunction with its

⁹⁰ While we do expect some variation among individual applicants, we stress that we are not prohibiting a state or school district from seeking uniformity in technological development, *i.e.*, through the use of statewide technology plans or requiring applicants to seek the same level or types of service.

⁹¹ See IBM Request for Review at 16.

⁹² See *infra* note 101 (regarding Commission's prohibition on duplicative services).

⁹³ See IBM Request for Review at 14-15.

⁹⁴ *Universal Service Order*, 12 FCC Rcd at 9078, para. 575.

applicant may obtain the RFP.¹⁰⁵ If an applicant does not have an RFP, it selects the box identified as, "No, I do not have an RFP for these services."¹⁰⁶

39 Ysleta checked the boxes indicating it did "not have" an RFP.¹⁰⁷ Five days later, it released a detailed RFP for Systems Integrator services. SLD found that Ysleta's statement that it did not "have" an RFP was misleading, because the fact that it released one less than a week later suggested that it did "have" an RFP at the time it submitted its FCC Form 470. Ysleta contends that it did not "have" the completed RFP until it was ready for release five days later. We recognize that due to the wording of that question, some applicants may have been unsure how to portray the fact that they had not yet released an RFP but intended to do so. On the other hand, the intent of the FCC Form 470 is to provide potential bidders with as much information as possible in order to maximize competition for applicant's contracts. We direct the Wireline Competition Bureau (WCB) to clarify on a revised FCC Form 470, before the start of Funding Year 2004, that an applicant shall certify either, "Yes, I have released or intend to release an RFP for these services" or "No, I have not released and do not intend to release an RFP for these services." We anticipate that applicants will know at the time that they submit their FCC Form 470 whether they intend to release an RFP relating to the services listed on the FCC Form 470. To the extent that the applicant also relies on an RFP as the basis of its vendor selection, that RFP must also be available to bidders for 28 days. This clarification will help to fulfill the purposes of the FCC Form 470 by informing potential bidders if there is, or is likely to be, an RFP relating to particular services indicated on the form.¹⁰⁸

40 State and Local Procurement Rules and Competitive Bidding. Ysleta and IBM argue that because Ysleta complied with state and local procurement processes, the Commission must approve its selection of IBM.¹⁰⁹ Ysleta states that the Commission has four competitive bidding requirements: the applicant must post an FCC Form 470, comply with state and local procurement laws, wait at least 28 days after posting the FCC Form 470 before signing a contract, and "possibly" consider price as the primary consideration.¹¹⁰ Ysleta argues that the requirement that applicants comply with state and local procurement laws "is the most important element."¹¹¹ IBM contends that in the *Fourth Order on Reconsideration*, the

¹⁰⁵ *Id*

¹⁰⁶ *Id*

¹⁰⁷ See Ysleta Form 470

¹⁰⁸ We note that IBM argues that Ysleta made a good faith effort on the FCC Form 470 to indicate that it was seeking a Technology Implementation and Systems Integration Partner. See IBM Request for Review at 13-14. Although Ysleta did so indicate, that is irrelevant, as the RFP did not present an adequate description of the underlying eligible services it was seeking.

¹⁰⁹ See Ysleta Request for Review at 15, 26, IBM Request for Review at 17-20.

¹¹⁰ Ysleta Request for Review at 15

¹¹¹ *Id*

to seek discounts consistent with their technology plans, in order to provide potential bidders with sufficient information on the FCC Form 470, or on an RFP cited in the FCC Form 470, to enable bidders to reasonably determine the needs of the applicant. An applicant may, in certain circumstances, list multiple services on its FCC Form 470, knowing that it intends to choose one over another. However, all products and services listed on the FCC Form 470 must be linked in a reasonable way to the applicant's technology plan and not request duplicative services.¹⁰¹ The Commission has previously stated that we expect applicants to "do their homework" in determining which products and services they require, consistent with their approved technology plan.¹⁰² We clarify prospectively that requests for service on the FCC Form 470 that list all services eligible for funding under the E-rate program do not comply with the statutory mandate that applicants submit "bona fide requests for services."¹⁰³

37 We do not expect that this prospective clarification will affect the manner in which the vast majority of applicants complete their FCC Forms 470. For some applicants, however, it will require more careful consideration of their actual technology needs. We expect that this clarification will ensure that the integrity the program and the purposes of our competitive bidding rules are met, while limiting waste, fraud, and abuse. Furthermore, we stress that our prospective clarification that "encyclopedic" FCC Forms 470 will not meet the requirements for a *bona fide* request for services does not alter our finding that Ysleta violated our competitive bidding requirement, because Ysleta's all-inclusive FCC Form 470 was accompanied by a RFP that sought bids for a systems integrator, which, based on the facts before us, functionally supplanted the FCC Form 470.

38 We also take this opportunity to clarify the wording on the FCC Form 470 regarding RFPs that provide more detailed solicitations for bidders than the FCC Form 470. Blocks 8, 9, and 10 of the form ask the applicant, "Do you have a Request for Proposal (RFP) that specifies the services you are seeking?"¹⁰⁴ If so, the applicant checks a box marked "Yes, I have an RFP" and indicates the Web site on which the RFP can be found, or the contact person from whom an

¹⁰¹ As the Commission recently stated, the E-rate program does not fund requests for duplicative services, because such requests cannot comply with our longstanding requirement that services be cost-effective. *See Second Order and FNPRM*, FCC 03-101, at paras 22-24. An FCC Form 470 that asks for all eligible services would necessarily seek duplicative services, because different products and technologies provide equivalent functionality for the same population in the same location during the same period of time. *Id.* at para. 24. An applicant may request duplicative services on the FCC Form 470 only if the technology plan reasonably indicates, for example, that the applicant is willing to consider alternative types of services to provide a given functionality. However, an applicant that simply lists every eligible service on the FCC Form 470 fails to base that request on its technology plan, and thus improperly seeks duplicative services.

¹⁰² *Universal Service Order*, 12 FCC Rcd at 9077, para. 573.

¹⁰³ 47 U.S.C. § 254(h)(1)(B).

¹⁰⁴ *See Schools and Libraries Universal Service, Description of Services Requested and Certification Form*, OMB 3060-0806 (May 2003) at 9-11 (FCC Form 470).

competitive bidding requirements.¹¹⁹ Such determinations regarding contractual interpretations are well within the purview of state and local procurement laws, where applicable. But we cannot rely solely upon state and local laws to effectuate our goals of ensuring support is provided without waste, fraud and abuse. The fact that there were four other bidders in this case and that none of them registered protests does not demonstrate that Ysleta's selection process met the requirements of our rules.¹²⁰ Nor did the other bidders, all of whom were bidding for Systems Integration services, have any incentive to assert that this procurement process did not comply with our rules, because all stood to gain from being awarded the Systems Integration contract, either by Ysleta or in another case. Similarly, other bidders would appear unlikely to challenge the Systems Integration approach because in doing so they would run the risk of losing both the Systems Integration contract with a school, and also the likelihood of being picked by the successfully bidding Systems Integrator to serve as a subcontractor.

43 Nor has the Commission ever held that compliance with state and local laws is "the most important element" in our competitive bidding rules.¹²¹ The four steps cited by Ysleta, and other Commission-imposed requirements such as the approval of a technology plan, are designed to work in concert to promote competitive bidding and assist schools and libraries in procuring the most cost-effective and appropriate services under the program. Compliance with state and local procurement rules is necessary, but not to the exclusion of compliance with other Commission requirements.

44 Ysleta and IBM also misread the Commission's rules and orders to assume that any state or local procurement process complies with the Commission's rules. In the *Tennessee Order*, the Commission stated that it would "generally rely on local and/or state procurement processes that include a competitive bid requirement as a means to ensure compliance with our competitive bid requirements."¹²² The two-step approach Ysleta utilized in procuring services fails to include a competitive bidding requirement for selecting specific E-rate eligible services. Therefore, it does not constitute a "state or local competitive bidding requirement" under our rules, even if such an approach may be a valid means of procurement under Texas law. Furthermore, as discussed below, while Texas law may permit competitive bidding, Texas law does not impose a competitive bidding requirement on eligible schools and libraries as was the case in the *Tennessee Order*.¹²³ Our rules state that "an eligible school . . . shall seek

¹¹⁹ *Id*

¹²⁰ See Ysleta Request for Review at 20-21, IBM Request for Review at 16

¹²¹ Ysleta Request for Review at 15. Because our rules and orders have been consistent in the consideration of the role of state and local competitive bidding rules, enforcing our minimum competitive bidding requirements does not, as alleged by IBM, represent a departure from Commission precedent requiring only prospective application. See IBM (Memphis) Request for Review at 9-10 (citing *Request for Review by Williamsburg-James City County Public Schools*, Order, 14 FCC Rcd 20152 (1999) (granting waiver where applicant submitted application violating Commission rules before rules were adopted)).

¹²² *Tennessee Order*, 14 FCC Rcd at 13739, para 10

¹²³ See *infra* para 45, note 123

Commission “confirmed the supremacy of state and local procurement rules”¹¹² when it stated that it would look to state or local procurement laws to determine whether a contract modification was “minor,” and that only where state procurement law was silent would the Commission apply a federal standard.¹¹³ Ysleta and IBM argue that our rules forbid us from preempting state and local procurement laws, and that because Ysleta’s selection of IBM was consistent with Texas law, we must approve that selection.¹¹⁴ In addition, they argue that the fact that none of the other bidders filed complaints indicates that the bidding process was fair and open.¹¹⁵

41 Although compliance with any applicable state and local procurement laws is one of the minimum requirements for selecting services under the E-rate program, there are also certain specific FCC requirements with which all E-rate applicants must comply, regardless of state and local law. Section 54.504(a) of the Commission’s rules specifically states that the Commission’s “competitive bid requirements apply in addition to state and local competitive bidding requirements . . .”¹¹⁶ For example, program rules require the posting of an FCC Form 470 and Form 471 in order to obtain funding under the program, and these constitute federal requirements that apply in all circumstances, regardless of state and local law. Similarly, even though a state or local procurement law may permit an applicant to forego competitive bidding for products and services under a certain dollar threshold, the Commission’s rules require that applicants for E-rate services seek competitive bids on all such services, to the extent that the services covered by the state law are eligible for discounts from the federal universal service fund.¹¹⁷

42 Even if we assume that Ysleta’s selection of IBM did not violate applicable state and local procurement law, such compliance would not automatically ensure compliance with our rules governing the selection of bidders in the E-rate program. The Commission has never recognized “the supremacy” of state and local laws over our competitive bidding requirements.¹¹⁸ The Commission’s examination of state and local procurement laws to determine whether a proposed contract modification was minor has no bearing on our

¹¹² IBM Request for Review at 18

¹¹³ IBM Request for Review at 19

¹¹⁴ See IBM Request for Review at 18-19

¹¹⁵ See Ysleta Request for Review at 19-21, IBM Request for Review at 16

¹¹⁶ 47 C.F.R. § 54.504(a)

¹¹⁷ For example, Louisiana does not require competitive bidding for services of \$10,000 or less. See La. Rev. Stat. § 2211A(10), La. Rev. Stat. § 2212 1A(1)(a); See also www.ebrschools.com/n/businessaffairs/purchasing/bidlaws/eona (summary of current Louisiana bid laws and policy prepared by East Baton Rouge Parish School System). To the extent this state law could apply to any services obtained through the e-rate mechanism, applicants would nevertheless still be required to comply with the Commission’s competitive bidding requirements.

¹¹⁸ IBM Request for Review at 18.

46 Although we do not believe that preemption of state or local rules is necessary here, we note that the Commission has previously recognized that there may be circumstances where our requirements could preempt state or local competitive bidding requirements if schools or libraries wish to receive E-rate discounts. In the *Tennessee Order*, the Commission provided guidance regarding section 54.504(a) by stating that it would only “generally” rely on state and/or local procurement processes, giving notice that there may be circumstances where the Commission will not rely on such processes.¹²⁸ The Commission stated that it did not need “in this instance” to make a separate finding of compliance with its competitive bidding requirements, because state and local “rules and practices will generally consider price to be a primary factor . . . and select the most cost-effective bid.”¹²⁹ But where the Commission determines from the specific circumstances that Commission rules were not met, *e.g.*, specific services were not subject to proper competitive bidding, the Commission need not and should not rely solely on state and/or local procurement processes to ensure compliance with our established regulatory framework. The Commission’s responsibility to combat potential waste, fraud, and abuse in the Commission’s program, while promoting goals such as having schools and libraries obtain the most cost-effective services, commands that the limited rules we impose regarding competitive bidding constitute a floor or minimum set of requirements. We will generally rely on state and/or local procurement processes, but there may be circumstances such as those presented here that require us to look beyond those processes to ensure that our threshold requirements are met.

47 Violations of Requirements of Cost-effectiveness and Price as the Primary Factor

The procurement process used by Ysleta also violates Commission requirements regarding the role of price in an applicant’s determination of cost-effectiveness when evaluating bids. Applicants must select the most cost-effective offerings, and price must be the primary factor in determining whether a particular vendor is the most cost-effective.¹³⁰ Price need not be the exclusive factor in determining cost-effectiveness, however, so that schools and libraries selecting a provider of eligible services “shall carefully consider all bids submitted and may consider relevant factors other than the pre-discount prices submitted by providers.”¹³¹

¹²⁸ *Tennessee Order*, 14 FCC Rcd at 13739, para 10

¹²⁹ *Id*

¹³⁰ See *Universal Service Order*, 12 FCC Rcd at 9029-30, para 481, 47 C.F.R. § 54.511(a). Ysleta suggests in a footnote that because the requirement that price be considered the primary factor is set forth in a Commission order rather than in our rules, it is subject to challenge, particularly because it conflicts with sections 54.504 and 54.511 of our rules. See Ysleta Request for Review at 15 n 5. We cannot agree that this language conflict with sections 54.504 or 54.511. Although we believe this requirement was sufficiently noticed, consistent with the Administrative Procedures Act, it is, at a minimum, a further explanation of sections 54.504 and 54.511 of the Commission’s rules. Ysleta also suggests that SLD adopted its own rules and policies at issue here “without a formal rulemaking as provided by law.” Ysleta Request for Review at 15 n 5. Ysleta misunderstands the ministerial role of SLD. The Commission, not SLD, establishes rules and policies governing the schools and libraries support mechanism through rulemakings and adjudicatory decisions. Pursuant to our rules, SLD administers the application process and implements procedures to ensure compliance with our rules. See 47 C.F.R. § 54.705(a).

¹³¹ 47 C.F.R. § 54.511(a)

competitive bids . . . *for all services*” and such services must be noticed with specificity.¹²⁴ Although Ysleta sought competitive bids for the service of Systems Integration, its procurement process did not include an effective competitive bidding requirement with respect to the actual services eligible for funding, and therefore, under both section 54.504 and the *Tennessee Order*, Ysleta’s procurement policies, even if consistent with state and/or local law, were not adequate to meet our requirements.

45 We find unconvincing IBM’s argument that because our rules state that our competitive bidding requirements “apply in addition to state and local competitive bid requirements and are not intended to preempt such state or local requirements,” if Texas law permits this two-step bidder selection and negotiation approach, then requiring competitive bidding of services under our program would constitute a federal preemption of state and local requirements in contravention of our rules.¹²⁵ Texas law does not forbid E-rate applicants from complying with our minimal competitive bidding requirements. Section 44.031 of the Texas Code, which governs school district purchasing contracts, explicitly permits school districts to make contracts subject to competitive bidding.¹²⁶ Texas law therefore does not preclude compliance with our threshold federal requirements.¹²⁷

¹²⁴ 47 C F R § 54.504

¹²⁵ IBM Request for Review at 28

¹²⁶ See Tex. Code Ann. § 44.031(a), White Paper, Review of Federal, State of Texas, and FCC E-rate Procurement Laws and Regulations, filed on behalf of IBM on April 24, 2003 (IBM White Paper) at 15. Section 44.031 states that a school district may, at its option, contract for professional services rendered by a financial consultant or a technology consultant in the manner provided by Texas Code Section 2254.003, which states that a governmental entity may not select a provider of professional services on the basis of competitive bids, but shall make the selection (1) on the basis of demonstrated competence and qualifications to perform the services, and (2) for a fair and reasonable price. See Tex. Code Ann. §§ 44.031, 2254.003. It is not clear that section 2254.003 authorizes a two-step selection process such as that engaged in by Ysleta, where the school district first selects the most highly qualified provider and then negotiates price. Such a process is described in a different section relating to contracts for “Professional Services of Architect, Engineer, or Surveyor.” 2254.004. Nor is it clear that IBM’s services in this case as a Systems Integrator would constitute those of an engineer under Texas law. See Texas Engineering Practice Act (stating that a “professional engineer” shall mean “a person who has been duly licensed by the Texas Board of Professional Engineers to engage in the practice of engineering.”) Tex. Rev. Civ. Stat. Ann. Art. 3271(a), Section 2(3). Furthermore, it is not clear whether “professional services” as defined in the Texas law encompasses any eligible services provided through the e-rate mechanism. But the fact remains that Texas law expressly permits school districts to engage in competitive bidding.

¹²⁷ See *Louisiana Public Service Commission v. FCC*, 476 US 355, 368-69 (1986) (“Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation.” Because Ysleta may, consistent with state law, comply with our rules, there is no “outright or actual” conflict between Texas law and our rules. It is certainly possible for Texas school districts to comply with our requirements.

weight than any other single factor.¹³⁸ When balancing the need for applicants to have flexibility to select the most cost-effective services and the limited resources of the program, we conclude that requiring price to be the single most important factor is a rational, reasonable, and justified requirement that will maximize the benefits of the E-rate discount mechanism, while limiting waste, fraud, and abuse.

51 Ysleta and IBM offer a number of arguments supporting their position that, consistent with our rules, Ysleta selected the most cost-effective services with price as the primary factor with its “two-step” selection process. They argue that the bid responses by the five bidders for Systems Integration services “included substantial information regarding the bidders’ experience and track record for efficient, successful performance of similar services.”¹³⁹ They further aver that the prices of eligible services were determined through careful negotiations with IBM during the second step of the selection process, after IBM had been “recommended” by the Ysleta Board of Trustees over the other four bids, but before Ysleta “selected” IBM by signing the contract.”¹⁴⁰ During this negotiating phase, IBM argues, price was the “sole and exclusive factor that determined whether IBM would ultimately be selected as the service provider.”¹⁴¹ Furthermore, IBM states, the RFP provided that if Ysleta could not negotiate “a fair and reasonable price with the offeror judged most highly qualified, negotiations will be made with the offeror judged next most highly qualified until a contract is entered into.”¹⁴² Thus, before signing the contract, Ysleta could cease negotiations with IBM and start over with another provider. Additionally, under the contract Ysleta retained the right to review pricing on an on-going basis, to obtain IBM’s own pricing information, to direct IBM to particular product vendors and require that products be acquired in accordance with Texas procurement law, and to modify or delete projects after funding was awarded.¹⁴³ Ysleta and IBM argue that the emphasis on price in these provisions cumulatively reflect that Ysleta complied with the Commission’s requirements in selecting the most cost-effective offering with price as the primary factor, in accordance with Texas “best value” practices.¹⁴⁴ They contend that because Ysleta must contribute significant costs in order to receive E-rate discounts, it had a strong incentive to select the most cost-effective services.¹⁴⁵

¹³⁸ For example, if in selecting bids an applicant assigns 10 points for reputation, 10 points to past experience, and 10 points to timing considerations, it must assign at least 11 points to price. This is how SLD has interpreted our requirements, which we find to be a reasonable administrative implementation of our rules.

¹³⁹ See IBM Request for Review at 29.

¹⁴⁰ See IBM Request for Review at 7, 30,

¹⁴¹ *Id.* at 30.

¹⁴² IBM Request for Review at 30, RFP § 1.12.

¹⁴³ Ysleta Request for Review at 29, General Contract § 10.01, IBM Request for Review at 32-33.

¹⁴⁴ IBM Request for Review at 32, IBM White Paper at 20, Ysleta Request for Review at 25-32.

¹⁴⁵ IBM Request for Review at 31-32, Ysleta Request for Review at 30.

48 In the *Universal Service Order*, the Commission stated that “price should be the primary factor in selecting a bid,” adding that other factors, particularly “prior experience, including past performance, personnel qualifications, including technical excellence; management capability, including schedule compliance; and environmental objectives” could “form a reasonable basis on which to evaluate whether an offering is cost-effective.”¹³² In *Tennessee*, the Commission provided additional “useful guidance with regard to our competitive bid requirements and factors that may be considered in evaluating competitive bids.”¹³³ The Commission specifically emphasized the significance of price of services as a factor in selecting bids. The Commission stated:

... [A] school should have the flexibility to select different levels of services, to the extent such flexibility is consistent with that school’s technology plan and ability to pay for such services, but when selecting among comparable services, however, this does not mean that the lowest bid must be selected. Price, however, should be carefully considered at this point to ensure that any considerations between price and technical excellence (or other factors) are reasonable.¹³⁴

49 In discussing the role of state and local procurement processes, however, the Commission stated that price would be “a primary factor” rather than “the primary factor.”¹³⁵ However, in discussing the *Fourth Reconsideration Order*, the Commission stated that price would be “the primary factor” rather than “a primary factor.”

50. We acknowledge that the Commission’s use of varying phraseology in the same decision created some ambiguity on this issue. To strengthen the consideration of price as “the primary factor” in the competitive bidding process, we hereby depart from past Commission decisions to the contrary¹³⁶ and clarify that that the proper reading of our rule, in light of the Commission’s longstanding policy to ensure the provision of discounts on cost-effective services, is that price must be the primary factor in considering bids.¹³⁷ Applicants may also take other factors into consideration, but in selecting the winning bid, price must be given more

¹³² *Universal Service Order*, 12 FCC Rcd at 9029-30, para. 481.

¹³³ *Tennessee Order*, 14 FCC Rcd at 13739, para. 9.

¹³⁴ *Id.* This view of price as the primary factor, where other factors are taken into consideration as well and balanced to determine cost-effectiveness, appears generally consistent with the “best value” concept cited in the Federal Acquisition Regulations. See 10 U.S.C. § 2305(a)(2), 48 C.F.R. § 2.101, IBM White Paper at 23-31.

¹³⁵ *Tennessee Order*, 14 FCC Rcd at 13739-40, paras. 10-11.

¹³⁶ *Id.*

¹³⁷ The Commission stated that a comparison of price was not determinative of a cost-effective bid in the factual scenario presented in the *Tennessee Order* only because it found that the differences in the services that were bid were such that the applicant could reasonably prefer one offering over another. This factual finding was consistent with the Commission’s statement that any consideration between price and other factors must be reasonable. *Id.*, 14 FCC Rcd at 13739, para. 9, see also *Universal Service Order*, 12 FCC Rcd at 9029-30, para. 48. Here, the petitioners failed to demonstrate that the Price of E-rate eligible services was a consideration at all in the first stage of the procurement process, much less the primary factor.

thereafter to keep prices reasonable, which helped result in cost-effective services. However, the Commission has determined that seeking competitive bids for eligible services is the most efficient means for ensuring that eligible schools and libraries are fully informed of their choices and are most likely to receive cost-effective services.¹⁵³ In a situation where several entities in fact are potentially interested in providing eligible services, we expect the applicant to make some effort to ascertain the proposed prices for the eligible services for each bidder. We do not think our goals of limiting waste are well served when an applicant merely compares the prices of one bidder against its internal assessment of what a "reasonable" price would be.

54 Even if an applicant receives only one bid in response to an FCC Form 470 and/or RFP, it is not exempt from our requirement that applicants select cost-effective services. The Commission has not, to date, enunciated bright-line standards for determining when particular services are priced so high as to be considered not cost-effective under our rules. There may be situations, however, where the price of services is so exorbitant that it cannot, on its face, be cost-effective. For instance, a proposal to sell routers at prices two or three times greater than the prices available from commercial vendors would not be cost effective, absent extenuating circumstances. We caution applicants and service providers that we will enforce our rules governing cost-effectiveness in order to limit waste in the program.¹⁵⁴

55 As for Ysleta and IBM's argument that E-rate applicants have sufficient incentive to select the most cost-effective services because they must contribute a portion of the costs, the Commission stated previously in the *Tennessee Order* that because an applicant must contribute its share, the Administrator "generally" need not make a separate finding that a school has selected the most cost-effective bid, even where schools do not have established competitive bidding processes.¹⁵⁵ It anticipated that a particular case may present evidence that even though an applicant followed state and local rules, the applicant did not select the most cost-effective services.¹⁵⁶ Our de novo review standard provides an ample basis for examining the facts more closely when, as here, there are indications that the applicants did not contract for the most cost-effective services.

¹⁵³ See *Universal Service Order*, 12 FCC Rcd at 9029, para. 480. Ysleta also argues that the Commission should not require that price be the primary factor given that "it is difficult for pricing to be the primary consideration in the technology area" because "pricing changes dramatically and hardware quickly becomes obsolete." Ysleta Request for Review at 26-27. We note, however, that Ysleta signed a one-year contract with IBM, and it is not unreasonable to expect applicants to anticipate price changes within a given year. Moreover, Ysleta's FCC Form 470 was posted on October 12, 2001, whereas IBM signed a contract with firm pricing only three months later on January 12, 2002. See Ysleta Form 470, Ysleta Request for Review at 11.

¹⁵⁴ It is illustrative of our concerns that Ysleta School Board President Wayne Belisle, quoted in the *El Paso Times*, termed the \$12.4 million for the technology help center "a huge waste of money." Corrie MacLaggan, *El Paso Times*, December 13, 2002. "YISD Denied Tech Funds."

¹⁵⁵ *Tennessee Order*, 14 FCC Rcd at 13739, para. 10.

¹⁵⁶ *Id.* ("Absent evidence to the contrary in a particular case, we believe that this incentive [to reduce costs] is generally sufficient to support a conclusion that a school has selected the most cost-effective bid for requested services.")

52 We first address IBM's argument that the November 15, 2001 bid responses for Systems Integration services "included substantial information regarding the bidders' experience and track record for efficient, successful performance of similar services."¹⁴⁶ Despite listing other E-rate projects it had completed, IBM's bid offered no specific pricing information regarding those projects to demonstrate to Ysleta that it had provided cost-effective services.¹⁴⁷ IBM's bid offered only general assurances relating to pricing, such as an explanation that IBM's profit margins "are consistent with our competitors," and the statement, "You are assured that IBM prices will always be market driven, competitive with other consulting firms of similar profile and skill levels, and within normal and customary charges for the type of services provided."¹⁴⁸ But the prices relevant for our competitive bidding requirements are those of eligible services, rather than the hourly rate for Systems Integration services. While non-price-specific information that goes to a bidder's experience and reputation can be important for determining cost-effectiveness, our past decisions require that actual price be considered in conjunction with these non-price factors to ensure that any considerations between price and technical excellence or other factors are reasonable.¹⁴⁹ As noted above, the Commission stated in the *Tennessee Order* that it "certainly expect[s] that schools will evaluate the actual dollar amount proposed by a bidder . . ." for eligible services during the bidding process.¹⁵⁰ Yet the only specific pricing information proposed by IBM or the other bidders was an hourly rate schedule for various individuals' services. Ysleta fails to demonstrate that both price and non-price factors were reasonably considered at this point.

53 Ysleta and IBM argue that Ysleta did not "select" IBM until it signed the contract, following extensive negotiations where Ysleta asserts it relied on its extensive expertise and its knowledge of information technology and contracting to ensure that pricing would be fair and reasonable.¹⁵¹ They argue that Ysleta could obtain cost-effective services both by negotiating price before signing the contract, and by exerting pricing pressure thereafter through its contractual right to review IBM's prices and direct IBM to select particular vendors, and modify or delete particular projects.¹⁵² They assert that Ysleta could abandon negotiations with IBM before signing the contract, and even after signing the contract would continue to exert pressure

¹⁴⁶ See IBM Request for Review at 29

¹⁴⁷ See IBM Bid at 3 7 6

¹⁴⁸ IBM Bid at 3 7 7

¹⁴⁹ See *Tennessee Order*, 14 FCC Rcd 13734, 13739, para 9 ("Price, however, should be carefully considered at this point [*i.e.*, when selecting among comparable services] to ensure that any considerations between price and technical excellence (or other factors) are reasonable")

¹⁵⁰ *Id.*, 14 FCC Rcd at 13740, para 13, *see supra* para. 24 IBM also states that it gave a "significant concession" to Ysleta by agreeing to maximum "not to exceed" prices for services, and argues that this helps to demonstrate that Ysleta acquired the most cost-effective services. See IBM Request for Review at 25 The fact that IBM agreed to capped prices in its contract does not strike us as a significant concession, nor does it demonstrate that Ysleta obtained the most cost-effective services

¹⁵¹ See Ysleta Request for Review at 28-29, IBM Request for Review at 31

¹⁵² Ysleta Request for Review at 29, IBM Request for Review at 32-33.

application of new rules and procedures.¹⁶⁴ Our rules cannot, and need not, address with specificity every conceivable factual scenario.¹⁶⁵ As stated above, our rules require applicants to seek competitive bids on eligible services, and to consider price as the primary factor. These rules are not new. Rather, we are applying them to the facts at hand, as is appropriate in an adjudicatory context. The fact that in prior years, USAC did not disapprove applications that utilized the procurement processes at issue in no way limits our discretion to apply our existing rules.¹⁶⁶

59 Other Rule Violations. Because we conclude that Ysleta violated our rules regarding competitive bidding, the requirement that price be the primary factor in selecting bidders, and the requirement that it make a *bona fide* request for services, we need not address SLD's conclusions that Ysleta and/or IBM violated other rules. However, because we are remanding the instant appeals to SLD and permitting similarly situated applicants that have appealed to re-bid, we take this opportunity to provide specific guidance regarding practices that are inconsistent with our rules to provide greater clarity to those applicants re-bidding services and future applicants. We emphasize that we will remain vigilant to prevent waste, fraud, and abuse in this program to ensure that the statutory goals of section 254 are met.

60 We emphasize that applicants and service providers are prohibited from using the schools and libraries support mechanism to subsidize the procurement of ineligible or unrequested products and services, or from participating in arrangements that have the effect of providing a discount level to applicants greater than that to which applicants are entitled. The Administrator has implemented this Commission requirement by requiring that: (1) the value of all price reductions, promotional offers, and "free" products or services be deducted from the pre-discount cost of services indicated in funding requests, (2) costs, trade-in allowances, and discounts be fairly and appropriately derived, so that, for example, the cost for eligible components is not inflated in order to compensate for discounts of other components not included in funding requests; and (3) contract prices be allocated proportionately between eligible and ineligible components.¹⁶⁷ We also stress that direct involvement in an application process by a service provider would thwart the competitive bidding process. These requirements are necessary to ensure that program funds are allocated properly, consistent with section 254.

61 We also emphasize that applicants may not contract for ineligible services to be funded through discounts under the E-rate program. In its response to Ysleta's RFP, IBM

¹⁶⁴ See IBM Request for Review at 40-41, Ysleta Request for Review at 40

¹⁶⁵ See, e.g., *Mastermind Order*, 16 FCC Rcd at 4032-33, para. 10 (finding violation of our rules even though rules did not specifically prohibit conduct at issue)

¹⁶⁶ See, e.g., *Request for Review by School for Language and Communication Development*, Order, 17 FCC Rcd 15166, 15169, para. 9 (Wireline Comp. Bur. 2002) (citing precedent and noting that failure to detect violations in prior funding years does not preclude SLD or the Commission from requiring compliance with the Commission's rules in subsequent years)

¹⁶⁷ 47 C.F.R. §§ 54.502 – 54.503. See also SLD web site, Free Services Advisory, <<<http://www.sluniversal-service.org/reference/freeservices.asp>>>

56 Violation of Bona Fide Requirement. Section 254(h)(1)(B) of the Telecommunications Act of 1934, as amended, states that E-rate applicants must submit a “*bona fide* request” for services.¹⁵⁷ The Commission has stated that the *bona fide* requirement means that applicants must conduct internal assessments of the components necessary to use effectively the discounted services they order, submit a complete description of services they seek so that it may be posted for competing providers to evaluate, and certify to certain criteria under perjury.¹⁵⁸ Further, applicants may violate the statutory *bona fide* requirement through conduct that undermines the fair and open competitive bidding process. In the *Mastermind Order*, the Commission found that a violation of its competitive bidding rules had occurred where a service provider listed as the contact person on the Form 470 also participated in the competitive bidding process as a bidder.¹⁵⁹ The Commission concluded that, even in the absence of a rule explicitly prohibiting such conduct, under such circumstances, a fair and open competitive bidding process had not occurred, and thus the requirement that an applicant make a *bona fide* request for services had been violated.¹⁶⁰

57 We conclude that Ysleta violated the statutory requirement that applicants submit a “*bona fide* request” for services under the E-rate program by using a two-step Systems Integration approach and by failing to use price of the actual services being sought as the primary factor in selecting IBM. Ysleta released an RFP in conjunction with its FCC Form 470, making it clear that it was seeking bids for a systems integrator, and not bids for the specific services listed in the FCC Form 470.¹⁶¹ As discussed above, the two-step Systems Integration approach is inconsistent with our competitive bidding requirements. Moreover, as discussed above, this procurement process violated Commission requirements regarding the role of price in determining the most cost-effective bid.¹⁶² Because Ysleta violated our competitive bidding requirements and failed to demonstrate that it selected IBM with price as the primary factor, we conclude that it also violated section 254’s mandate that applicants submit a *bona fide* request for services.¹⁶³

58 Retroactive Application of New Rules We reject the contention that the denial of discounts for the procurement practices utilized in these cases represents a retroactive

¹⁵⁷ 47 U.S.C. § 254(h)(1)(B)

¹⁵⁸ *Universal Service Order*, 12 FCC Rcd at 9076, para. 570. See *supra* para. 5.

¹⁵⁹ See *Request for Review of the Decision of the Universal Service Administrator by Mastermind Internet Services, Inc.*, Federal State Joint Board on Universal Service, CC Docket No. 96-45, Order, 16 FCC Rcd 4028, 4033, para. 10 (2000) (*Mastermind Order*).

¹⁶⁰ *Id.* 16 FCC Rcd at 4032-33, paras. 10-11.

¹⁶¹ See *supra* para. 33.

¹⁶² See *supra* paras. 47-53.

¹⁶³ For future purposes, parties should also remember that, as clarified above, the requirement for a *bona fide* request also means that applicants must submit a list of specified services for which they seek discounts, consistent with their technology plans, in order to provide potential bidders with sufficient information on the FCC Form 470 to enable bidders to reasonably determine the needs of the applicant. See *supra* para. 35.

end-user workstation operating systems and hardware, and Help Desks typically field questions about the operation and configuration of end-user software. Such end-user support is not eligible for E-rate funding. Even if the actual correction of a problem involves non-contractor personnel, and is therefore not reimbursed with E-rate funds, the routing and logging function of the comprehensive Help Desk activities would effectively support ineligible services, and therefore is ineligible for discounts.

65 We expect that following the re-bidding of contracts described below, SLD will carefully scrutinize applications to ensure that discounts are provided only for eligible services.¹⁷⁵ For example, SLD will examine applications to ensure that if they include project management costs for Systems Integrators or others, such costs do not include the cost of ineligible consulting services.¹⁷⁶ Our mandate is to ensure that the statutory goals of section 254 are met without waste, fraud, and abuse. We emphasize that competitive bidding is a key component of our effort to ensure that applicants receive the most cost-effective services based on their specific needs, while minimizing waste in the program. The various procurement practices described above (and described in the attached appendix) represent a significant departure from the competitive bidding practices envisioned by the Commission, which were designed to best fulfill the goals of section 254. Although aspects of particular approaches utilized by individual applicants may, taken out of context, appear not to constitute a significant violation of our rules, the practices in each of the above-captioned Requests for Review weaken, undercut, or even subvert the Commission's competitive bidding requirements. We clarify our rules concerning these competitive bidding requirements where such clarification is appropriate, and, as detailed below, allow for re-bidding of services because some applicants may have relied on past approval by the Administrator of some of these practices. Fundamentally, however, this Order confirms the competitive bidding framework the Commission established in the *Universal Service Order* and which has been clarified and upheld in subsequent Orders.

IV. RE-BIDDING OF SERVICES FOR FUNDING YEAR 2002

66 Although we conclude that the practices followed in these cases are not consistent with our rules, we find that there is good cause for a waiver of our rules regarding the filing window for Funding Year 2002. Under the unique circumstances presented here, we find that good cause exists to direct SLD to re-open the filing window for Funding Year 2002 in order to permit Ysleta, and similarly situated applicants listed in the caption who appealed SLD's denial of their funding requests, to re-bid for services, to the extent such services have not already been provided.

67 A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.¹⁷⁷ In addition, the Commission may take into account considerations of

¹⁷⁵ Furthermore, our rules provide that if 30 percent or more of a request for discounts made in an FCC Form 471 is for ineligible services, the request shall be denied in its entirety. See 47 C.F.R. § 54.504(c)(1).

¹⁷⁶ Initial planning activities, such as design of technology architecture, determination of project scope, and evaluation of what technologies and products to utilize, constitute consulting services and are ineligible for discounts under the program. See Funding Year 2002 Eligible Services List.

¹⁷⁷ *Northeast Cellular*, 897 F.2d 1164, 1166 (DC Cir. 1990).

offered to provide as Ysleta's "Technology Partner" many apparently ineligible services, such as teacher and administrative personnel training, consulting services, and assistance in filling out forms.¹⁶⁸ IBM and Ysleta assert that to the extent such services were proposed in IBM's bid, they were merely "generic descriptions of the global set of services the company is capable of providing" and were not included in the final contract.¹⁶⁹ When Ysleta rebids for services, we direct SLD to carefully scrutinize the requests to ensure no funding is committed for ineligible services.

62 An analysis of Ysleta's application suggests that it sought support for "Help Desk" services, as part of the Technical Support Statement of Work.¹⁷⁰ A computer Help Desk accepts support calls from end users, and initiates action to resolve the problem. This action might involve initial diagnostics, creation of a Trouble Ticket, logging the support call, and alerting other personnel that a problem exists.

63 As a result of the complex and evolving nature of the E-rate program and the technologies it supports, our rules do not codify a precise list of products and services that are eligible. Instead, SLD has developed a generalized list of eligible services in an effort to provide clarity to applicants of which services are eligible under governing rules.¹⁷¹ Among other things, the Funding Year 2002 Eligible Services list defined as eligible: "Technical Support is the assistance of a vendor-provided technician. This support may include the installation, maintenance and changes to various services and equipment under contract. Technical support is only eligible if it is a component of a maintenance agreement or contract for an eligible service or product, and it must specifically identify the eligible services or products covered by the contract."¹⁷² The Eligible Services List thus implemented the Commission's holding in the *Universal Service Order* that support may be provided for "basic maintenance services" that are "necessary to the operation of the internal connections network."¹⁷³

64. When confronted with products or services that contain both eligible and ineligible functions, SLD in the past has utilized cost allocation to determine what portion of the product price may receive discounts.¹⁷⁴ We generally endorse this practice as a reasonable means of addressing mixed use products and services. When SLD reviews the applications that are submitted after the rebidding occurs, it should ensure that discounts are provided only for "basic maintenance" and not for technical support that falls outside the scope of that deemed eligible in the *Universal Service Order*. For instance, calls from end-users may involve problems with

¹⁶⁸ See, e.g., IBM Bid at 3 7 2, 3 7 4 3 7 6

¹⁶⁹ See IBM Request for Review at 34-35

¹⁷⁰ See Ysleta FCC Form 471

¹⁷¹ See Funding Year 2002 Eligible Services List

¹⁷² See *id*

¹⁷³ *Universal Service Order*, 12 FCC Rcd at 9021-22, para. 460.

¹⁷⁴ See <<www.sl.universalservice.org/reference/costallocationguide.asp>>

71. Similarly, a number of applicants point to SLD's past approval of funding requests that utilized all-inclusive FCC Forms 470.¹⁸³ These applicants observe that the approved funding requests are similar or identical to that submitted by Ysleta.¹⁸⁴

72. We recognize that in certain instances, our rules and past decisions did not expressly address the circumstances presented here. That, however, does not preclude a finding that there has been a violation of our competitive bidding rules.¹⁸⁵ In considering how to remedy this violation, we seek to enforce our rules to prevent waste, fraud and abuse, while also considering factors of hardship, fairness, and equity. For the reasons described below, we find that waiver of our rules to permit applicants to rebid services in accordance with the terms below is in the public interest in light of the uncertain application of our rules to the novel situation presented, and the substantial and widespread reliance on prior SLD approval.

73. The Commission has previously granted a waiver of its rules where one factor that it took into account was confusion caused by the application of a new rule.¹⁸⁶ We anticipate that we will rarely find good cause to grant a waiver of our rules based on confusion among applicants in applying them. We think that it is appropriate to consider this factor with regard to the instant appeals, however, as they involve the application of our rules to a unique situation, namely the two-step System Integration approach and related practices. The exercise of our discretion to grant such a waiver in this instance is also informed by the extent to which applicants relied upon the fact that other applicants that utilized this approach previously were approved for funding. We have previously considered an applicant's good faith reliance in deciding whether to grant a waiver of our rules.¹⁸⁷ Here, we think that such consideration is appropriate because enforcement of these rules in these circumstances would impose an unfair hardship on these applicants.¹⁸⁸ Accordingly, in light of all these factors, we find that it is in the public interest to grant a waiver of our rules in the novel situation posed by the instant case.

74. We therefore direct the Administrator to re-open the Funding Year 2002 filing window for all of the applicants set forth in the caption.¹⁸⁹ Applicants will have sixty days from

¹⁸³ See *supra* note 100

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Request for Review by Naperville Community Unit School District 203*, Order, 16 FCC Rcd 5032 (2001) (*Naperville*) (noting confusion among a number of applicants based on the redesign of the FCC Form 471 and where specific request was new to the application), see also *Request for Review by Eastern Lebanon County School District*, Order, 18 FCC Rcd 5466 (2003).

¹⁸⁷ See *Request for Review by Edumaster Net, DBA Mastermind Learning Center, or Mastermind Internet Services, Year 3 Filing Window*, Order, 15 FCC Rcd 15281, 15284-85, paras. 9-11 (2000) (*Mastermind Filing Window Order*).

¹⁸⁸ See *IBM Request for Review* at 41

¹⁸⁹ Commission precedent exists for re-opening the filing window where the Commission deemed it appropriate following competitive bidding violations. See *Mastermind Filing Window Order*, 15 FCC Rcd at 15285, para. 11

hardship, equity, or effective implementation of overall policy on an individual basis.¹⁷⁸ In sum, a waiver is appropriate if special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule.¹⁷⁹

68 Although we affirm SLD's denial for the reasons set out above, we find that these applicants should be allowed to re-bid services in accordance with the terms set forth below. We exercise our discretion in this matter for the following reasons.

69 SLD could reasonably have been construed as sanctioning the two-step Systems Integration process by approving the El Paso Independent School District's application for the previous year, Funding Year 2001. Although the record is unclear, there are indications that other applicants may have engaged in similar procurement practices even prior to El Paso's Funding Year 2001 application.¹⁸⁰ IBM marketed its success with the El Paso contract, as one approved by SLD.¹⁸¹ In its bid for Systems Integration services for Ysleta, IBM explained that the El Paso school district had received less than \$2 million in E-rate funding in Funding Year 2000, but that after El Paso selected IBM as a Systems Integrator for Funding Year 2001, El Paso received over \$70 million in funding under the program.¹⁸²

70 Ysleta maintains that it was strongly influenced by SLD's prior approval of the two-step Systems Integration approach used by El Paso to select IBM. As Ysleta states,

[Ysleta] was well aware of the large program funding award to [El Paso] for [Funding Year 2001], through the local media and conversations with [El Paso] officials. Consequently, [Ysleta] was under the impression that [El Paso's] model of selection of a service provider was a more effective method in light of the large award, and that [Ysleta] has been unduly restrictive on its requests. [Ysleta] had no reason to believe that there was any actual or alleged problem with [El Paso's] methodology, since the SLD had approved the [El Paso] model for large [Funding Year 2001] funding. [Ysleta] requested the form of the request proposal directly from [El Paso], and made appropriate changes thereon, culminating in the Request for Proposal

¹⁷⁸ *WAT Radio v. FCC*, 418 F.2d 1153, 1157 (DC Cir. 1969).

¹⁷⁹ *Northeast Cellular*, 897 F.2d at 1166.

¹⁸⁰ See IBM Bid at 71-76 (citing IBM's prior success with other applicants, reflecting similarities to Ysleta's practices).

¹⁸¹ See IBM Bid at 71.

¹⁸² See IBM Bid at 71.

re-bid in accordance with the terms of this Order. Applicants who were denied by SLD under similar factual circumstances, but who elected not to file appeals with SLD or the Commission, may not re-bid, because they failed to preserve their rights on appeal.

80 The Commission remains staunchly committed to limiting waste, fraud, and abuse in the program. The Administrator's diligence in finding and addressing the problems cited in the instant Order for Funding Year 2002 are a reflection of that commitment. We direct the Administrator to carefully scrutinize the applications submitted following the re-bidding process, to ensure full compliance with all of our rules.

V. ORDERING CLAUSES

81 ACCORDINGLY, IT IS ORDERED, pursuant to section 54.722(a) of the Commission's rules, 47 C.F.R. §54.722(a), that the following Requests for Review ARE DENIED: Request for Review filed by Ysleta Independent School District, El Paso, Texas, on January 30, 2003; Request for Review filed by International Business Machines, Inc., on behalf of Ysleta Independent School District, El Paso, Texas, filed on January 30, 2003; Request for Review of Donna Independent School District, Donna, Texas, filed on May 6, 2003; Request for Review of International Business Machines, Inc., on behalf of Donna Independent School District, Donna, Texas, filed May 9, 2003; Request for Review of Galena Park Independent School District, Houston, Texas, filed April 28, 2003; Request for Review of International Business Machines, Inc., on behalf of Galena Park Independent School District, Houston, Texas, filed May 9, 2003; Request for Review of Oklahoma City School District I-89, Oklahoma City, Oklahoma, filed May 8, 2003; Request for Review of International Business Machines, Inc., on behalf of Oklahoma City School District I-89, Oklahoma City, Oklahoma, filed May 9, 2003; Request for Review of El Paso Independent School District, El Paso, Texas, filed May 8, 2003; Request for Review of International Business Machines, Inc., on behalf of El Paso Independent School District, El Paso, Texas, filed May 9, 2003; Request for Review of Navajo Education Technology Consortium, Gallup, New Mexico, filed April 22, 2003; Request for Review of Memphis City School District, Memphis, Tennessee, filed May 27, 2003; Request for Review of International Business Machines, Inc., on behalf of Memphis City School District, Memphis, Tennessee, filed May 23, 2003; Request for Review of Albuquerque School District, Albuquerque, New Mexico, filed May 23, 2003; and Request for Review of International Business Machines, Inc., on behalf of Albuquerque School District, Albuquerque, New Mexico, filed May 23, 2003.

the date of release of this Order to resubmit their FCC Forms 470. In order to receive full consideration as in-window applicants for Funding Year 2002, the affected applicants must comply with all stages of the original application process. Specifically, applicants must seek competitive bids for all services eligible for discounts, and submit to the Administrator completed FCC Forms 470 on or before February 6, 2004. The Administrator will post the FCC Forms 470 to its web site, and once the FCC Forms 470 have been posted for 28 days and the applicant has signed a contract for eligible services with a service provider, the applicants must then submit their FCC Forms 471. In all cases, the applicants must file their completed FCC Forms 471 on or before April 23, 2004.

75 In accordance with this Order, applicants will be required to submit FCC Forms 470 that set forth in sufficient detail the services requested, or that reference RFPs that do so. *Applicants must seek competitive bids for eligible services, requiring potential bidders to submit proposed prices for specified services.* Applicants may select a Systems Integrator for project management, but not without seeking bids from potential Systems Integrators that specify prices to be charged by the Systems Integrator for eligible services. Nothing in this Order prevents IBM from submitting new bids for services

76 *Re-submitted applications shall be capped at the amount of pre-discount funding that applicants originally sought.* We direct the Administrator to ensure that no applicant receives funding in excess of the amount for which the applicant originally applied for each individual funding request. However, because many of the contracts at issue in the instant appeals may not have been the most cost-effective offerings for obtaining eligible services, we fully anticipate that applicants will obtain substantial savings over their original applications once they have re-bid for actual E-rate eligible services. As noted above, we direct the Administrator not to approve requests for discounts on maintenance costs that are not cost-effective.

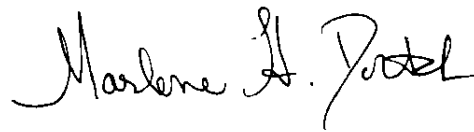
77 To the extent an applicant proceeded to take service, particularly telecommunications services or Internet access, notwithstanding SLD's denial of discounts, we do not and will not provide funding to pay for such services. We therefore do not grant a waiver of the filing window with respect to any requests for services that have already been provided as of the date of this Order. We do not believe that such a conclusion is overly harsh, since applicants proceeded at their own risk to take service, and we would be remiss to permit discounts in a situation where parties assumed the risk of proceeding in the face of SLD's denial. The loss of discounts for such services is a fair and appropriate consequence of the actions of these applicants.

78 Applicants that sought funding in Funding Year 2003 for internal connections products or services for which SLD denied discounts in Funding Year 2002 for competitive bidding violations may not receive discounts for the identical products or services in both Funding Year 2002 and Funding Year 2003. After rebidding, if applicants receive funding commitments in both 2002 and 2003 for identical products and services, they must cancel the funding requests for one of the two years.

79 Although each application under the E-rate program is unique to some degree, we conclude that all of the appellants listed in the attached appendix demonstrate factual circumstances sufficiently similar to those in the instant appeal as to merit a denial and right to

82 IT IS FURTHER ORDERED, pursuant to sections 1-4, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54 and 254, and section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, that the Funding Year 2002 filing window deadline established by the Schools and Libraries Division of the Universal Service Administrative Company pursuant to section 54.507(c) of the Commission's rules IS WAIVED for the affected applicants listed in the Appendix of this Order, and the Schools and Libraries Division shall take the steps outlined above to effectuate this Order.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Marlene H. Dortch".

Marlene H Dortch
Secretary